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5 IN THE UNITED STATES DISTRICT COURT

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9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 I.N., a minor, by and through her mother and
11 *Guardian ad Litem*, Zarinah F., and
J.B., a minor, by and through his mother
and *Guardian ad Litem*, Alisa B.,

No. C 18-03099 WHA

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Plaintiffs,

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v.

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JENNIFER KENT, Director of the Department
of Health Care Services, and State of California
DEPARTMENT OF HEALTH CARE
SERVICES,

**ORDER RE (1) MOTION
FOR CLASS CERTIFICATION,
AND (2) MOTION FOR
PRELIMINARY APPROVAL
OF CLASS SETTLEMENT**

Defendants.

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INTRODUCTION

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In this putative class action under the Medicaid Act and other federal statutes, plaintiffs move for conditional certification of a settlement class and the parties jointly move for preliminary approval of a class settlement. For the reasons below, both motions are **GRANTED**.

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STATEMENT

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California's Medicaid program, called "Medi-Cal," was codified in the California Welfare & Institutions Code. Defendant California Department of Health Care Services was the designated state agency that administered and supervised the program. CAL. WELF. & INST. CODE § 14100.1. DHCS did not provide services directly but rather contracted with and reimbursed participating providers for services. Under one aspect of the Medicaid program known as the Early and Periodic Screening, Diagnostic, and Treatment program ("EPSDT"), defendants provided certain services to eligible children under the age of 21. *Katie A., ex rel.*

1 *Ludin v. Los Angeles Cty.*, 481 F.3d 1150, 1154 (9th Cir. 2007). These services included
2 medically necessary “private duty nursing services” and case management services. 42 U.S.C.
3 § 1396d(a).

4 Suing through their parents, plaintiffs I.N. and J.B. had significant physical disabilities
5 and received Medi-Cal benefits. Defendants DHCS and DHCS Director Jennifer Kent
6 authorized plaintiffs' receipt of in-home nursing services as part of their Medi-Cal benefits.
7 Although I.N. and J.B. required total assistance for all activities of daily living, both plaintiffs
8 received fewer hours of services than defendants authorized. Plaintiffs further allege that
9 defendants placed the burden on them to navigate a complex system with little to no support to
10 obtain needed in-home nursing care (Amd. Compl. ¶¶ 84–127).

11 In 2017, prior to initiating this litigation, plaintiffs' counsel notified defendants that
12 families were struggling to secure approved in-home nursing services and were not receiving
13 meaningful assistance in arranging for such services. After being unable to reach a resolution,
14 plaintiffs initiated this action in May 2018. In August 2018, plaintiffs filed an amended
15 complaint for injunctive relief under the Medicaid Act, the Americans with Disabilities Act and
16 the Rehabilitation Act. Plaintiffs did not seek damages. In October 2018, an order denied
17 defendants' motion to dismiss the amended complaint for lack of subject-matter jurisdiction.
18 Since November 2018, the parties have engaged in discovery and in multiple in-person
19 settlement discussions under the supervision of Magistrate Judge Jacqueline Corley. Although
20 the undersigned judge generally disallows class-wide settlement discussions prior to class
21 certification, such discussions were permitted in this case because plaintiffs only sought
22 injunctive relief. Plaintiffs now move for certification of a class for settlement purposes and the
23 parties jointly move for preliminary approval of a class-wide settlement (Dkt. Nos. 1, 45, 66,
24 102–05). This order follows full briefing and oral argument.

ANALYSIS

1. CERTIFICATION OF A SETTLEMENT CLASS.

27 Plaintiffs seek to certify a class comprised of all Medi-Cal beneficiaries who are EPSDT
28 eligible and for whom Medi-Cal Private Duty Nursing (*i.e.*, in-home nursing) services have

1 been approved. A party seeking class certification must affirmatively demonstrate his
2 compliance with FRCP 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).
3 Pursuant to FRCP 23(a), for a named plaintiff to obtain class certification, a court must find:
4 (1) numerosity of the class; (2) common questions of law or fact; (3) that the named plaintiff's
5 claims and defenses are typical; and (4) that the named plaintiff can adequately protect the
6 interests of the class. In the instant case, plaintiffs seek to certify a class under FRCP 23(b)(2).
7 Certification under FRCP 23(b)(2) requires that the court find that the defendant "has acted or
8 refused to act on grounds that apply generally to the class, so that final injunctive relief or
9 corresponding declaratory relief is appropriate respecting the class as a whole."

10 **A. Numerosity.**

11 The numerosity requirement of FRCP 23(a)(1) is satisfied when joinder of individual
12 plaintiffs would be impracticable. Based on a December 2016 study in which DHCS identified
13 over 3,500 EPSDT-eligible beneficiaries who were approved for Medi-Cal in-home nursing
14 services, plaintiffs anticipate that the proposed class includes thousands of individuals.
15 Plaintiffs have satisfied their burden regarding numerosity.

16 **B. Commonality and Typicality.**

17 A class has sufficient commonality under FRCP 23(a)(2) if "there are questions of law
18 or fact common to the class." FRCP 23(a)(2) does not require each member in a class to have
19 identical factual and legal issues surrounding his or her claim. "The existence of shared legal
20 issues with divergent factual predicates is sufficient" to meet the requirements of FRCP
21 23(a)(2). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The typicality
22 requirement of FRCP 23(a)(3) is satisfied when "the claims or defenses of the representative
23 parties are typical of the claims or defenses of the class." A plaintiff's claims are typical if they
24 "are reasonably co-extensive with those of absent class members; they need not be substantially
25 identical." *Hanlon*, 150 F.3d at 1020.

26 Here, plaintiffs' claims are based on allegations that defendants failed to arrange for
27 approved in-home nursing services. Plaintiffs' parents had to instead rely on their own efforts
28 to find nurses with little to no help. In investigating this case, plaintiffs' counsel spoke with

1 over one hundred families with similar stories. The claims of each class member regarding the
2 extent to which defendants failed to arrange for necessary levels of in-home nursing services
3 and defendants' resulting liability under federal law are common to the class. The commonality
4 and typicality requirements are accordingly satisfied.

5 **C. Adequacy.**

6 FRCP 23(a)(4) requires that "the representative parties will fairly and adequately protect
7 the interests of the class." Determining whether the representative parties will do so involves
8 two inquiries: (1) do the named plaintiffs and their counsel have any conflicts of interest with
9 other class members, and (2) will the named plaintiffs and their counsel act vigorously on
10 behalf of the class? *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
11 1978). Accordingly, "a class representative must be part of the class and possess the same
12 interest and suffer the same injury as the class members." *East Tex. Motor Freight Sys. Inc. v.
13 Rodriguez*, 431 U.S. 395, 403 (1977) (citations and quotation marks omitted).

14 Nothing in the record indicates that plaintiffs have a conflict of interest with absent class
15 members or will not prosecute this action vigorously on behalf of the class. Plaintiffs' counsel,
16 moreover, has zealously pursued relief on behalf of the class through a multi-year investigation
17 and litigation. Plaintiffs' counsel also have significant experience in representing people with
18 disabilities and in complex class actions and litigation regarding Medi-Cal benefits (Leiner
19 Decl. ¶¶ 2–16; Somers Decl. ¶¶ 2–14; Newman Decl. ¶¶ 2–9; Schwartz Decl. ¶¶ 2–6).

20 Although defendants do not dispute that plaintiffs' counsel prosecuted this action
21 vigorously and have the requisite legal knowledge and experience, defendants oppose plaintiffs'
22 motion to the extent it seeks appointment of six attorneys at four different law firms. Instead,
23 defendants argue, only one law firm should be appointed to serve as class counsel. This order
24 disagrees. Although the undersigned has expressed in prior cases that it is best to have only one
25 law firm as class counsel so as to avoid unnecessary duplication and excessive fees, *Castaneda*
26 *v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), plaintiffs have agreed to cap their fees
27 and costs in the amount of \$435,000 and have sufficiently explained why the appointment of
28 more than one law firm is appropriate so that plaintiffs' counsel can most effectively oversee

1 and monitor defendants' compliance with the agreement. This order concludes that plaintiffs
2 and their counsel are adequate representatives as required by FRCP 23(a)(4) and appoints
3 William Leiner and Elissa Gershon of Disability Rights California, Sarah Somers and Jane
4 Perkins of National Health Law Program, Robert Newman of the Western Center on Law and
5 Poverty, and Richard Schwartz of Browne George Ross LLP as class counsel. William Leiner,
6 however, remains responsible for the case.

7 **D. FRCP 23(B)(2) General Applicability.**

8 Plaintiffs seek to certify the settlement class under FRCP 23(b)(2), which requires that
9 "the party opposing the class has acted or refused to act on grounds that apply generally to the
10 class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting
11 the class as a whole." "These requirements are unquestionably satisfied when members of a
12 putative class seek uniform injunctive or declaratory relief from policies or practices that are
13 generally applicable to the class as a whole." *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir.
14 2014) (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010)). Such is the case here.

15 This action only seeks injunctive relief and the proposed settlement agreement would
16 provide for uniform class-wide relief, including the designation of a Medi-Cal program or
17 contracted organization that will provide case management services to secure class members'
18 approved in-home nursing services, oversight and monitoring of case management agencies by
19 defendants, and the ability for class members to contact DHCS directly with questions or
20 concerns about their in-home nursing or the case management services they are receiving.
21 Certification under FRCP 23(b)(2) is therefore appropriate. Having demonstrated that FRCP
22 23(a) and 23(b)(2)'s requirements are met, plaintiffs' motion for certification of a settlement
23 class is **GRANTED**.

24 **2. MOTION FOR PRELIMINARY APPROVAL.**

25 Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of
26 a certified class . . . may be settled . . . only with the court's approval." Preliminary approval is
27 appropriate if "the proposed settlement appears to be the product of serious, informed,
28 non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential

1 treatment to class representatives or segments of the class, and falls within the range of possible
2 approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)
3 (Chief Judge Vaughn Walker). The parties’ proposed settlement agreement satisfies these
4 requirements.

5 **A. Benefit to Class Members.**

6 Plaintiffs have not sought damages in this action. The proposed settlement agreement
7 instead provides for injunctive relief. *First*, defendants will designate case management service
8 providers for class members and will require those providers to help class members obtain in-
9 home nursing through various methods. To the extent necessary, defendants will require
10 service providers to revise their policies and procedures so as to implement the agreement’s
11 requirements. *Second*, class members will be able to contact defendants directly with questions
12 or concerns about the in-home nursing or case management services they receive.
13 *Third*, defendants will require service providers to send notices to class members (separate and
14 apart from the class notice required by FRCP 23(e)) with information regarding the case
15 management services available to them. *Fourth*, class counsel will monitor defendants’
16 implementation of the agreement. Defendants will also provide class counsel with aggregate
17 data regarding email communications that concern in-home nursing services and will meet with
18 class counsel at least three times during the term of the agreement. *Fifth*, the agreement
19 provides that the district court will retain jurisdiction over the case for nine months after
20 defendants sends its notices to the impacted service providers. Should any disputes arise
21 regarding implementation of the agreement, the dispute resolution process will be overseen by
22 Magistrate Judge Jacqueline Scott Corley or her designee.

23 This motion follows depositions and the parties’ exchange of written discovery.
24 Continuing forward in litigation would not only impose risks and costs on plaintiffs and the
25 class, but would also delay the implementation of the parties’ agreed-upon remedies. In light of
26 the risks of continued litigation and the significant injunctive relief set forth in the proposed
27 settlement agreement, the settlement falls within the range of possible approval.
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B. Scope of the Release and Other Considerations.

2 The proposed settlement agreement releases only claims actually asserted in this action.
3 No damages claims are waived. The scope of the release in the proposed settlement agreement
4 is therefore appropriately tailored and falls within the range of possible approval. Another
5 factor weighing in favor of preliminary approval is that the proposed settlement agreement
6 came about as a result of extensive mediation efforts supervised by Judge Corley, including four
7 in-person settlement conferences and subsequent deliberations. This background is not
8 dispositive but nevertheless is relevant to the question of whether this proposed settlement
9 agreement appears to be “the product of serious, informed, non-collusive negotiations.” *See In*
10 *re Tableware*, 484 F. Supp. 2d at 1079.

C. Notice.

12 Under the proposed settlement, defendants will identify class members by running
13 queries in its databases and case management systems and requiring service providers to
14 provide names and client index numbers. With that data, DHCS will compile a class list and
15 run a query in the Medi-Cal Eligibility Data System to obtain the home address and language
16 preference of each class member. Defendants will then utilize a third-party contractor to
17 translate and mail the approved class notices. Plaintiffs' counsel will also establish a website to
18 provide class members with information about the settlement. The proposed class notice
19 satisfies the requirements of FRCP 23(c)(2)(B) and 23(e)(1), as it clearly describes of the nature
20 of the action, the injunctive relief called for in the settlement agreement, and the implications of
21 and process for objecting to the settlement and participating in the fairness hearing.¹

CONCLUSION

23 For the foregoing reasons, plaintiffs' motion for class certification for settlement
24 purposes is **GRANTED**. The following class is **CERTIFIED** for purposes of settlement: All
25 Medi-Cal beneficiaries who are EPSDT eligible and for whom Medi-Cal Private Duty Nursing

27 ¹ The parties' motion explains that defendants' publications are ordinarily reviewed by staff dedicated
28 to editing the text to meet a sixth-grade reading level. The parties have deferred to the undersigned's judgment
as to whether this additional review is necessary here. This order concludes that this additional readability
review is not needed.

1 services have been approved. Plaintiffs I.N. and J.B. are hereby **APPOINTED** as class
2 representative. Plaintiffs' counsel from Disability Rights California, National Health Law
3 Program, the Western Center on Law and Poverty, and Browne George Ross LLP are hereby
4 **APPOINTED** as class counsel.

5 The terms of the parties' settlement agreement are hereby **PRELIMINARILY APPROVED**
6 as being fair, reasonable and adequate to the members of the class, subject to further
7 consideration at the final approval hearing. The joint motion for preliminary approval of the
8 settlement is **GRANTED**. The proposed form of notice for the class is **APPROVED**. Notice
9 should be distributed to the class by **JUNE 13**. By this same date, plaintiffs shall file their
10 motion for attorney's fees and costs.

11 The deadline for filing objections to the settlement is **JULY 11**. The parties shall
12 respond to any objections to the settlement by **JULY 25**. By this same date, the parties shall file
13 a motion for final approval of the class settlement. A hearing to consider whether the class
14 settlement should be given final approval, and to consider plaintiffs' motion for an award of
15 attorney's fees and costs, is **SET** for **AUGUST 8 AT 11:00 A.M.** The final pretrial conference and
16 trial dates are hereby **VACATED** and will be reset if final approval is not granted.

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18 **IT IS SO ORDERED.**

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20 Dated: April 7, 2019.

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22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE

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